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Protest Decision

Matter of: Twin Med, LLC dba GroveMed

Case No.: 2022-119

Posting Date: December 16, 2021

Contracting Entity: State Fiscal Accountability Authority

Solicitation No.: 5400021848

Description: STC Medical Supplies & Equipment

DIGEST

Protest alleging unfairness and an unlevel playing field is denied. The protest letter of Twin Med, LLC dba GroveMed (TM) is included by reference. (Attachments 1)

AUTHORITY

The Chief Procurement Officer¹ (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

¹ The Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

BACKGROUND

Solicitation Issued:	09/29/2021
Amendment 1 Issued	10/29/2021
Amendment 2 Issued	11/03/2021
Amendment 3 Issued	11/18/2021
Protest Received	11/18/2021

The State Fiscal Accountability Authority (SFAA) issued this Invitation for Bids (IFB) on September 29, 2021, to establish a state term contract for Medical Supplies & Equipment. Amendment 1 was issued on October 29, 2021. Amendment 2 was issued on November 3, 2021. TM filed a Protest on November 18, 2021. Amendment 3 was issued on November 18, 2021 suspending the procurement pending resolution of this protest.

This solicitation includes four (4) lots. An Excel workbook is attached to the solicitation and includes a spreadsheet for each lot. Each spreadsheet allows bidders to submit pricing for specific items in a market basket, a percentage discount for non-market basket items, and a restocking fee. The source for market basket includes specific products with anticipated quantities and requires a unit price for each item.

Amendment 2 clarified that the discount for non-market basket purchases applied to items on the Offeror's published catalog, price sheet, or price schedule. For bidding purposes, this discount will be applied to estimated purchases of \$2,753,646.30. The spreadsheet adds the total price of the market basket to the discounted amount of the estimated non-market basket purchases to determine the total bid price for the lot. The restocking fee is not included in calculating the bid price. Award is to be made to the three lowest responsive and responsible bidders in each lot.

ANALYSIS

TM raises four issues it believes limits competition and creates an unlevel playing field. The first issue is related to the establishment of catalog pricing for non-market basket items as set forth in Amendment 2:

Currently, the highest dollar volume of products purchased by the state have been provided in a market basket. The remainder of products in your catalog(s), not listed on the market basket, will be purchased at market discount percentage rate.
The discount rate will be subject to the MSRP at the time the order is placed.

Your discount must apply to a published catalog, price sheet, or price schedule. The catalog price in effect at the time of bid submission shall be in effect for the initial term of the contract awarded unless there is a price reduction. No specialized catalog price is acceptable. The market discount percentage rate will remain fixed for the initial contract period plus all exercised optional renewal periods.

(emphasis in original) [Amendment 2, Page 14]

The amendment also includes a requirement that all items offered under the resulting contract be published on the Vendor's web site:

Vendor shall publish the market basket products and additional items offered under this contract on their official website. The state is open to the layout of pricing information on the vendor's website with the understanding that this layout will include the following information: **part number, description, cost and state's price for both market basket items and all other catalog items.** This will alleviate the guess work in the state's price.

[Amendment 2, Page 15]

TM asserts:

1. This approach invites the bidders to create their own catalog with a MSRP of whatever they choose. As long as the pricing is available on the web, it is published. For example, someone may mark up all of their items 300% and then offer a discount of 50%. The State could end up spending way more than their current spend even though the bid calculates a reduction/savings.

TM's protest ground is speculative. It assumes that a vendor will create a phony published catalog price simply to game a South Carolina contract. A catalog price is not something you create simply for purposes of responding to a solicitation. Further, TM's protest draws a false distinction between a "published" and an "established" catalog price. For purposes of this solicitation, a "published catalog price" is not much different than an "established catalog price" as defined in Section 11-35-1410(4):

'Established catalog price' means the price included in a catalog, price list, schedule, or other form that:

- (a) is regularly maintained by a manufacturer or vendor of an item;
- (b) is either published or otherwise available for inspection by customers;

- (c) states prices at which sales are currently or were last made to a significant number of buyers constituting the general buying public for the supplies, services, or information technology involved.

This definition has adequate safeguards against the manipulation of catalogs and only by meeting the definition can the price be considered fair and reasonable and competitively established in the open market. The opportunity for competitive advantage is minimized to the extent required by law and this issue of protest is denied, with special instructions below to clarify the language to ensure no confusion.

The next issue raised by TM questions basis for the estimate of non-market basket purchases:

- 2. The non-market basket list of spend is not based on list price as it is. Those items were purchased under the existing bid which is a cost plus. Providing a discount off of list price could dramatically increase the State's spend.

For bidding purposes, the solicitation established the purchase volume for non-market basket items at \$2,065,234.73 based on 10% of total sales during the previous contract:

For the rest of your catalog, non-market basket, give a percentage discount rate. The percentage discounted rate will be evaluated by taking the estimated cost of non-market basket items purchased during the 2017-2020. The estimated cost of non-market basket items is assumed to be (10%) ten percent of all sales.

[Amendment 2, Page 21]

This issue is speculative. It assumes that the State will spend materially more simply because the prices on the previous contract were established by adding a percentage to the cost of an item while the current solicitation will establish prices by taking a discount off the list price. The amount purchased from the previous contract is the amount that was actually purchased, and the State estimated that 10% of those purchases were non-market basket purchases. This estimate has a reasonable and rational basis. All bidders are treated equally by applying their discount against the same estimated amount. Speculation that the actual purchases may be higher or lower is not an impairment to fair and open competition. This issue is dismissed.

TM again questions the establishment of catalog prices:

3. Manufacturers in this industry may or may not have a published MSRP for their products so it would be up to each bidder to determine what that should be and would not allow for a level playing field and an adequate basis for comparison of bids.

As stated above, established catalog prices, as defined by the Code, create a level playing field for competitive purposes. There is no competitive advantage, and this issue is dismissed.

The final issue raised in the protest by TM alleges that the products listed in lot 4 unfairly favor a competitor:

4. In lot 4, one bidder has an exclusive right on many of the lot items. Therefore, all other bidders are one tier removed and as such, can have dramatically different prices, even if they provide the same discount or higher.

The market basket products sought through this solicitation are identified by brand name.

Equivalent products by other manufacturers will be accepted as set forth in Amendment 2:

- (a) If items called for by this invitation for bids have been identified in the schedule by a "brand name or equal" description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering "equal" products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the bid and are determined by the State to meet fully the relevant characteristics requirements listed in the invitation.

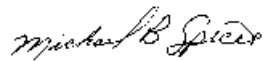
[Amendment 2, Page 14]

Any disadvantage created by brand name identification is negated by the acceptance of equivalent products. This issue of protest is denied.

DECISION

For the reasons stated above the protest of Twin Med, LLC dba GroveMed is denied, and procurement is returned to the State Fiscal Accountability Authority for clarification through an amendment that the published catalog price is actually the “established catalog price” as defined by S.C. Code Ann. § 11-35-1410(4).

For the Materials Management Office

A handwritten signature in black ink, appearing to read "Michael B. Spicer". The signature is written in a cursive, flowing style.

Michael B. Spicer
Chief Procurement Officer

John E. Schmidt, III
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John@SchmidtCopeland.com



Melissa J. Copeland
803.309.4686
Missy@SchmidtCopeland.com

November 18, 2021

Via Electronic Delivery to protest-mm@mmo.state.sc.us

Chief Procurement Officer
Materials Management Office
Mr. Michael B. Spicer
1201 Main Street, Suite 601
Columbia, SC 29201

Re: Protest of Specifications, Solicitation #5400021848, STC Medical Supplies & Equipment (the "IFB")

Dear Mr. Spicer:

This firm represents Twin Med, LLC dba GroveMed ("Grove"). This Protest is being provided to the Chief Procurement Officer ("CPO") pursuant to S.C. Code Ann. § 11-35-4210, with respect to the above referenced solicitation.

The grounds of this protest of the specifications of the IFB are set forth below.

Grounds of Protest

Within the IFB, there are four market basket lots that have specific market basket pricing. The IFB then provides a dollar amount of non-market basket pricing in that category and asks bidders to provide a discount off of that dollar amount. Section III – Scope of Work/Specifications, first paragraph says " the discount rate will be subject to MSRP at the time the order is placed. Your discount must apply to a published catalog, price sheet or price schedule. The catalog price in effect at the time of bid submission shall be in effect for the initial term of the contract awarded unless there is a price reduction. No specialized catalog price is acceptable."

This IFB and the above-reference specification is improper and must be revised for the following reasons:

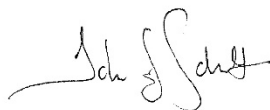
1. This approach invites the bidders to create their own catalog with a MSRP of whatever they choose. As long as the pricing is available on the web, it is published. For example, someone may mark up all of their items 300% and then offer a discount of 50%. The State could end up spending way more than their current spend even though the bid calculates a reduction/savings.

2. The non-market basket list of spend is not based on list price as it is. Those items were purchased under the existing bid which is a cost plus. Providing a discount off of list price could dramatically increase the State's spend.
3. Manufacturers in this industry may or may not have a published MSRP for their products so it would be up to each bidder to determine what that should be and would not allow for a level playing field and an adequate basis for comparison of bids.
4. In lot 4, one bidder has an exclusive right on many of the lot items. Therefore, all other bidders are one tier removed and as such, can have dramatically different prices, even if they provide the same discount or higher.

Conclusion

For these reasons, and based on further evidence to be supplied and testimony to be received at a hearing on this matter, Grove requests a hearing, an imposition of the automatic stay, and cancellation and reissuance of the solicitation in a manner that assures competition, fairness and a level playing field for all competitors.

Very truly yours,



John E. Schmidt, III

cc: Manton Grier, Esquire, mgrier@ogc.sc.gov
Portia Davis, pdavis@mimo.sc.gov

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised May 2020)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILING FEE: Pursuant to Proviso 111.1 of the 2020 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. *[The Request for Filing Fee Waiver form is attached to this Decision.]* If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

-
1. What is your/your company's monthly income? _____
 2. What are your/your company's monthly expenses? _____
 3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.